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No. 85-798

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

PETTY MOTOR COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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1 APP

QUESTION PRESENTED

Whether the provisions of 28 U.S.C. 1921, governing the assessment of fees of United States marshals for conducting foreclosure sales, are to be interpreted according to state or federal law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20-26) is reported at 767 F.2d 712. The order of the district court (Pet. App. 27-28) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1985, and a petition for rehearing was denied on August 13, 1985 (Pet. App. 43). The petition for a writ of certiorari was filed on November 8, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Petty Motor Company challenges payment of a marshals fee under 28 U.S.C. 1921 on real property it purchased in a judicial foreclosure sale conducted by the United States Marshals Service. The sale resulted from

mortgage foreclosure proceedings brought by the Small Business Administration against Colonial Ford in the United States District Court for the District of Utah.[1] On September 29, 1982, the district court ordered that the subject property "be sold at public auction by the United States Marshal in the manner prescribed by law for such sale" (Pet. App. 31). The marshal advertised and conducted the sale in accordance with Utah law, since the court did not specify what law was to be applied. Petitioner, by agreement of the interested parties, purchased the mortgaged property using a credit bid of $1,361,531.50, equal to the amount of indebtedness. Petitioner submitted $20,427.94 as payment for the marshals fee, but also filed a motion requesting the district court to determine the proper marshals fee payable under 28 U.S.C. 1921. The marshal is entitled under Section 1921 to a percentage of the sale proceeds as a commission if three acts are performed: (1) the seizing or levying of property; (2) the disposition of the property by sale, setoff or otherwise; and (3) the receiving and paying over of money.[2]

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[1]The SBA's foreclosure action, which was filed on June 16, 1978, was consolidated with a pending foreclosure action brought against Colonial Ford by Ford Motor Credit Company (Pet. App. 27). Although Ford Motor Credit Company was listed by the district court as being the priority lienholder, followed by the United States and then petitioner (*id.* at 40), petitioner is the assignee of the judgment of Ford Motor Credit Company and acquired its priority lien rights.

[2]28 U.S.C. 1921 provides in pertinent part:

> Only the following fees of United States marshals shall be collected and taxed as costs, except as otherwise provided:
>
> * * * * *
>
> For seizing or levying on property (including seizures in admiralty), disposing of the same by sale, setoff, or otherwise and receiving and paying over money, commissions of 3 per centum on the first $1,000 of the amounts collected and 1 ½ per centum on the excess of any sum over $1,000.

2. The district disallowed the statutory marshals fee on the ground that "there was no 'receiving and paying over money' " (Pet. App. 28) as required by 28 U.S.C. 1921. The court assessed only the actual costs of the sale, approximately $211, against petitioner (Pet. App. 27-28).

The court of appeals reversed (Pet. App. 21-26). It held that the credit bid represented a "constructive transfer of funds" in satisfaction of the "receiving and paying over money" requirement of the statute (*id.* at 25). The court also rejected petitioner's argument that Fed. R. Civ. P. 69(a) requires that the terms of 28 U.S.C. 1921 be interpreted by applying state law.[3] Specifically, petitioner claimed that the marshal did not satisfy the prerequisite that there be a "levy" or "seizure" because under Utah law a judicial sale requires neither a levy nor a seizure. The court reaffirmed its decision in *Hill* v. *Whitlock Oil Services, Inc.*, 450 F.2d 170 (10th Cir. 1971), that 28 U.S.C. 1921 is to be interpreted by applying federal law. The court in *Hill* defined "levy" as meaning " 'to take control of * * * property' " (450 F.2d at 174). The court noted that in a judicial sale, the marshal takes "control of the land under a court order to hold a foreclosure sale for the satisfaction of a judgment" and "in effect levie[s] on the land" (*ibid.*). Applying *Hill* in the instant case, the court held that Rule 69(a) was not applicable, and judicial sales involve a "levy" for purposes of 28 U.S.C. 1921 (Pet. App. 25).

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[3]Rule 69(a) provides in pertinent part:

> Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceeding on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

ARGUMENT

Petitioner correctly notes that there is a conflict over whether state law is to be applied in defining the terms used in 28 U.S.C. 1921. Three circuits have applied Fed. R. Civ. P. 69(a) and state law to deny recovery of a marshals fee under 28 U.S.C. 1921 for a judicial sale. *Travelers Insurance Co.* v. *Lawrence,* 509 F.2d 83 (9th Cir. 1974); *James T. Barnes & Co.* v. *United States,* 593 F.2d 352 (8th Cir. 1979); *Federal Land Bank* v. *Hassler,* 595 F.2d 356 (6th Cir. 1979). Although we submit that the result reached by the court below, reaffirming its prior position in *Hill* v. *Whitlock Oil Services, Inc., supra,* is clearly correct,[4] we did not seek review of the contrary decisions because we did not believe that the conflict was of sufficient importance to merit this Court's review. We are still of that view.

1. a. Petitioner contends (Pet. 9-11) that the marshal is not entitled to the statutory fee because a judicial sale, unlike an execution sale, does not involve a "levy" or

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[4]Petitioner erroneously suggests (Pet. 11) that the decision below is inconsistent with *Hill.* The Tenth Circuit here and in *Hill* held that for purposes of 28 U.S.C. 1921 judicial sales, like execution sales, constitute a levy. The fact that the court of appeals in the present case recognized the legal distinction between a judicial sale and an execution sale (Pet. App. 25) scarcely creates a conflict with *Hill.*

Petitioner also contends (Pet. 12) that the decision below is inconsistent with *International Paper Co.* v. *Whitson,* 595 F.2d 559 (10th Cir. 1979). Again, petitioner's claim lacks merit. In *International Paper Co.* the court, applying Rule 69(a), held that the Department of Housing and Urban Development could not obtain a deficiency judgment after foreclosure on a mortgage because it failed to comply with the state's procedure for entry of a deficiency judgment. In this case, however, the focus is not on procedure, but rather on what Congress meant by the terms "levy" and "seizure" in 28 U.S.C. 1921.

In all events, to the extent there is any inconsistency in the Tenth Circuit's decisions, it is for that court to resolve.

"seizure" of property within 28 U.S.C. 1921.[5] Neither term is defined in Section 1921. Therefore, as the court stated in *Hill*, "[t]he controlling consideration * * * is legislative intent." 450 F. 2d at 173. Nothing in the legislative history of 28 U.S.C. 1921 suggests that Congress intended marshals to conduct judicial sales without the statutory compensation. Indeed, the legislative history suggests otherwise.[6] In 1962 Congress amended 28 U.S.C. 1921 to provide a percentage formula for the calculation of marshals fees in order to achieve uniformity by eliminating the prior practice in which marshals fees varied from state to state. H. R. Rep. 1724, 87th Cong., 2d Sess. 2, 5 (1962). The uniform fee schedule was also designed to "increase the fees charged to private litigants for the services of U.S. marshals" (*id.* at 2).

To prevent marshals from obtaining the statutory fee for judicial sales, depending on the vagaries of state law, would resurrect the disuniformity that Congress sought to eliminate in enacting 28 U.S.C. 1921 and result in private litigants receiving a substantial federal service for a nominal

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[5]As the court of appeals explained (Pet. App. 25, quoting *Yazoo & M.V.R. R.* v. *Clarksdale*, 257 U.S. 10, 19 (1921)), a judicial sale "is within the control of the court because the court sets the standards (procedure) under which the sale will be conducted," whereas an execution sale " 'issue[s] by mere praecipe of the judgment creditor * * * and only come[s] under judicial supervision on complaint of either party.' "

[6]Judge Sneed, dissenting in *Travelers Insurance Co.* v. *Lawrence*, 509 F.2d at 90-95, pointed out that although the "seizing or levying on property" language had been in the predecessor of Section 1921 since 1853, there was no suggestion that either the original or the amended statute excluded judicial sales. Indeed, given the wide variations among the state laws in this area, Judge Sneed suggested that Congress could not practically have defined with greater specificity the types of mortgage foreclosures to be covered: the language incorporated into Section 1921 "is general in scope and * * * has proved elastic enough to embrace mortgage foreclosures under the procedures of each of the states for more than a century." 509 F.2d at 93.

fee—or even no fee at all.[7] That is certainly not what Congress intended. In addition, since the marshal must undertake essentially the same effort for a judicial sale as for an execution sale, there is simply no rationale that would justify reading the words "levy" or "seizure" to exclude judicial sales.

b. Petitioner nevertheless argues that Fed. R. Civ. P. 69(a) requires that reading in this case. Petitioner contends that Rule 69(a) directs the federal courts to look to state law to define the terms "levy" and "seizure" in Section 1921, and to determine whether the marshal is entitled to the statutory fee. No such fee is due here, petitioner asserts, because under Utah law, neither a levy nor a seizure occurs in a judicial sale. Assuming arguendo that petitioner's interpretation of state law is correct, this argument must nevertheless be rejected. As noted above, reliance on state law for the definition of the terms in Section 1921 is inconsistent with the aim of uniformity underlying enactment of that Section. H. R. Rep. 1724, *supra,* at 5. As the court stated in *Hill,* 450 F.2d at 174:

> The attainment of uniformity requires not only the same rate, but the same method of assessment. The commission should be allowed or denied for substantially the same services in whatever jurisdiction they may be rendered. Uniformity is impossible if the right of the Marshal depends on the fine distinctions which state law may draw.

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[7]Since 28 U.S.C. 1921 is phrased in mandatory terms, at least one court has concluded that the Section does not permit the award of any fee if the prerequisites for the award of the statutory fee are not satisfied. *Federal Land Bank* v. *Hassler,* 595 F.2d at 358-359. Cf. *Transamerica ICS, Inc.* v. *M/V Hellenic Sun,* No. 84-2220 (4th Cir. Dec. 2, 1985) (district court has no authority to modify marshals fee prescribed by 28 U.S.C. 1921).

See also *Transamerica ICS, Inc.* v. *M/V Hellenic Sun*, No. 84-2220 (4th Cir. Dec. 2, 1985), slip op. 6 ("Section 1921 is intended to provide a uniform method of computing those commissions").[8]

Moreover, Rule 69(a) is inapplicable by its own terms. It applies to process for the execution of a money judgment and in aid of such execution. "A judicial foreclosure by nature falls outside the realm of post-judgment satisfaction" (Pet. App. 24). And, in any event, the Rule itself provides for the application of state law "except that any statute of the United States governs to the extent that it is applicable." The advisory committee notes to Rule 69 (Fed. R. Civ. P.) identify 28 U.S.C. (1954 ed.) 574, the predecessor of Section 1921, as one of the federal statutes that is within this exception. Section 1921 obviously enjoys the same status.

c. Petitioner finally contends (Pet. 13) that state law is applicable to 28 U.S.C. 1921 by virtue of 28 U.S.C. 2001(a), which provides that real estate sold under a court order "shall be sold * * * upon such terms and conditions as the court directs." Section 2001(a) applies to judicial sales. *Yazoo & M. V. R. R.* v. *Clarksdale*, 257 U.S. 10, 18-19 (1921). The district court here directed that the sale be conducted in " 'the manner prescribed by law,' " and the marshal in fact followed state law procedures in conducting the sale. But it simply does not follow that the marshals fee was also to be established by state law. Instead, as we have shown, the enactment of 28 U.S.C. 1921 was intended to avoid that result and to create a nationally uniform fee system.[9]

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[8]Petitioner's construction of 28 U.S.C. 1921 also leads to a distinction, not contemplated by the statute, between seizures in admiralty and other actions. See *Coast Engine & Equipment Corp.* v. *Sea Harvester, Inc.*, 641 F.2d 723, 727 (9th Cir. 1981).

[9]Petitioner makes the same arguments based on Fed. R. Civ. P. 69(a) and 28 U.S.C. 2001 in contending that the marshal did not satisfy the

2. Although we accordingly believe that the court of appeals correctly applied 28 U.S.C. 1921 in this case, we have not asked this Court to review the cases in other circuits that reach a different result in conflict with the Tenth Circuit's original pronouncement on this matter in *Hill* v. *Whitlock Oil Services, Inc., supra.* The issue is no more worthy of review in this case.

The disagreement is simply over the method of calculating the fees due the Marshals Service in a narrow category of cases. As the paucity of reported cases indicates, this issue does not arise frequently. Moreover, while the amounts involved can be substantial when the judicial foreclosure sale involves valuable property,[10] and uncertainty over the fees recoverable can lead to unnecessary litigation, the disagreement has not seriously hampered the operations of the Marshals Service or affected the use of marshals to conduct judicial sales.

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requirement of 28 U.S.C. 1921 that he "receiv[e] and pay[ ]over money." Petitioner asserts that under state law, no commission is earned unless "money changes hands," and a credit bid does not satisfy that requirement. For the reasons stated above, state law is not controlling. Nor is it persuasive. As the court of appeals concluded, the credit bid was "a constructive transfer of funds" (Pet. App. 25). Accepting petitioner's argument would "ignore[ ] the reality and the economic effect * * * of the credit transaction and thereby frustrate[ ] the intent of Congress that private parties pay the cost of the services rendered to them by the government" (*ibid.*).

[10]For example, the district court awarded only $211.14 in marshals fees here, while the statutory fee under Section 1921 amounted to $20,427.94. This disparity is due to the fact that the statutory fee is a percentage of the value of the property involved, with no cap. Although the percentage formula may result in large fees where, as here, the property involved is valuable, because the formula has no floor it also yields small fees where the property is of only moderate value. Congress evidently concluded that this method of calculating fees, while it may be imprecise in any particular case, best accommodates the interests of private litigants as a whole with the need to raise revenues to reimburse the Marshals Service for services provided.

The dispute over the appropriate amount of marshals fees in judicial sales is essentially a policy question best resolved in Congress. To that end, the Department of Justice has determined to seek clarifying legislation and, in December 1985, submitted to Congress a legislative proposal entitled the "United States Marshals Service Act of 1985." See H.R. 3870, 99th Cong., 1st Sess. This proposal includes an amendment to 28 U.S.C. 1921, specifically making it applicable to "judicially ordered sales and execution sales, without regard to whether the judicial order or sale constitutes a seizure or levy within the meaning of State law" (H.R. 3870, *supra,* at 11).[11] The pendency of this proposed amendment makes review of the legal issue raised by petitioner particularly inappropriate at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11]The proposed legislation also authorizes the Attorney General to "prescribe * * * regulations which establish a minimum and maximum amount for the commission collected under" Section 1921 (H.R. 3870, *supra*, at 12).